KUALA IBAI DEVELOPMENT SDN BHD

v.

KUMPULAN PERUNDING (1988) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[ORIGINATING SUMMONS NO: R3-25-13-98]
16 NOVEMBER 1998

ARBITRATION: *Arbitrator - Duties of an arbitrator - Impartiality - Power of court to revoke authority of arbitrator for impartiality - Test applicable - Whether 'reasonable suspicion' test or 'real likelihood' test - Whether impartiality must arise out of relationship with parties or subject referred - Arbitration Act 1952, s. 25*

ARBITRATION: *Arbitrator - Removal of, for misconduct - Application to remove arbitrator rejected by arbitrator - Failure to hear submissions of applicant - Consideration of irrelevant matters - Delegation of duty - Award of costs without successful party justifying the same - Communication with party without knowledge of others - Earlier relationship between arbitrator and party - Whether reasonable suspicion or real likelihood of bias made out - Whether acts of arbitrator amounts to misconduct - Arbitration Act 1952, ss. 24 & 25*

ARBITRATION: *Arbitrator - Powers of arbitrator - Delegation of duty - Issue in application referred to legal counsel - Whether amounts to delegation of duties - Whether amounts to misconduct - What ought arbitrator do if uncertain on issue - Arbitration Act 1952, s. 22*

ARBITRATION: *Arbitrator - Powers of arbitrator - Discretion to direct costs - Costs ordered without successful party having to justify the same - Whether against rules of natural justice - Whether amounts to misconduct - Whether award vitiated - Arbitration Act 1952, s. 19*

This was an application to set aside an interim award of an arbitrator on the ground of misconduct pursuant to s. 24 of the Arbitration Act 1952 ('the Act') and for leave to revoke the authority of the arbitrator to act as the arbitrator on the ground of reasonable suspicion of bias pursuant to s. 25 of the Act. The said arbitrator had earlier dismissed an application by the applicant and the second respondent for the disqualification and removal of the arbitrator on the ground of bias or likelihood of bias. The arbitrator also ordered costs of the application to disqualify to be borne by the applicant and the second respondent.

With regard the claim to set aside the said award, the applicant contended that the arbitrator had committed several acts of misconduct. Firstly, it was contended that the arbitrator had prejudged the issue on whether he should disqualify himself as arbitrator. It was in evidence that in response to the applicant's request for an adjournment to make submissions on whether the arbitrator should disqualify himself, the arbitrator made statements to the effect that there was no ground for him to disqualify himself and that since he had already accepted the appointment as arbitrator, a decision to withdraw would look badly on him. Based on this statement, the applicant's second contention was that the arbitrator had taken into consideration irrelevant matters. Thirdly, the applicant charged the arbitrator with delegation of his power and duty. In support of this contention, it was in evidence that the arbitrator had obtained an independent legal opinion in respect of the application to disqualify himself and this was done without the knowledge or consent of the applicant. Fourthly, the applicant claimed that by not affording the applicant or the second respondent an opportunity to make submissions as to costs, the arbitrator had failed to grant them a proper hearing as to the question of costs. Fifthly, the applicant submitted that the arbitrator had reversed the burden of proof in deciding the quantum of costs since the arbitrator arrived at the quantum without the first respondent justifying its claim. Objection was also raised against the arbitrator's decision that costs be paid forthwith although there was no such request by the first respondent. Lastly, the applicant complained of a telephone conversation the arbitrator had with the second respondent without the knowledge of other counsels. All these, it was submitted, amounted to misconduct on the part of the arbitrator.

As for the application to revoke the authority of the arbitrator under s. 25 of the Act, the applicant contended that the arbitrator may not be impartial as a result of his earlier relationship with the architect involved in the project between the parties. It was averred that the arbitrator and the said architect had studied together, stayed at the same place when they were studying and that they both had common friends. These facts coupled with the arbitrator's subsequent conduct, it was submitted, suggests that the arbitrator may not be impartial in the arbitration proceedings and thus his authority ought to be revoked.

Held:

[1] Parties to an arbitration are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide. They are also entitled to expect from him a faithful, honest and disinterested decision. Lack of impartiality or bias will be a ground on which objection may be taken against an arbitrator. The arbitrator must not only be free from bias but there must not even be an appearance of bias.

[2] An arbitrator must always act judicially with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words used must always be measured and circumspect. He must rule only after hearing the parties. He should always maintain the dignity and impartiality of the appointment.

[3] The power of the High Court to give relief for leave to revoke the authority of the arbitrator where an arbitrator is not impartial is provided under s. 25 of the Act. The meaning of the word "impartial" in s. 25(1) of the Act is not restricted to the relationship of the arbitrator to any other parties to the agreement or connection of the arbitrator to the subject referred.

[3a] If an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred.

[4] An arbitrator can be or perceived to be impartial arising out of his conduct or arising out of his racial prejudice.

[5] As to whether an arbitrator is deemed to be biased or not, the 'reasonable suspicion' test and the 'real likelihood' test are both accepted as being the law at present. The trend, however, is towards the application of the 'reasonable suspicion' test as in essence the 'reasonable suspicion' test seems to be somewhat broader than the 'real likelihood' test.

[6] The arbitrator's remarks in response to the applicant's request for an adjournment to make submissions tend to give the impression that the arbitrator has prejudged the applicant's application without waiting for the further submission of the applicant. It does not matter whether the remarks of the arbitrator were made before or after the submission. What is important is that an arbitrator should keep an open mind and not to prejudge the issue before hearing fully the arguments of the parties. Prejudging the issue is a misconduct.

[7] The remarks made by the arbitrator is an irrelevant consideration. It gave the impression that the arbitrator is taking into consideration factors which he ought not to have taken into consideration. The arbitrator is more concerned with his image rather than having to attend to the issue at hand which is whether there are any merits in the applicant's application. This again amounts to misconduct.

[8] In the absence of prior consent of the parties, the arbitrator has no authority to engage independent legal counsel and direct the applicant and second respondent to bear the cost. The unfair and unauthorised conduct of the arbitrator makes the proceedings irregular. This irregularity is not consonant with the general principles of equity and good conscience.

[9] An arbitrator who is appointed to decide upon disputes involving questions of law must make his own decision. He cannot transfer it to another and adopt as his own the decision of some legal adviser. If he cannot proceed without instruction as to the law, he should state a case to the court or, if the parties prefer it, for the opinion of counsel.

[9a] In the instant case, the arbitrator referred the very issue which forms the subject matter of the applicant's application before him to the independent legal counsel for the opinion. This certainly amounts to a delegation of the arbitrator's power and duty, and therefore, a misconduct of the proceedings.

[9b] If an arbitrator is not confident in his ability to decide the issue in an application, he may resort to the provision of s. 22 of the Act in the form of a special case for the decision of the High Court. This, the arbitrator did not do here.

[10] Although s. 19(1) of the Act gives the arbitrator the discretion "to direct and by whom and in what manner those costs or any part thereof shall be paid …", the discretion must be exercised judiciously, in accordance with the law and the principles of natural justice.

[10a] The arbitrator directed the costs of the first respondent to be paid forthwith without a request by the first respondent. Moreover, there is no exceptional circumstances shown to the arbitrator to warrant the costs to be paid forthwith.

[10b] In arriving at the decision to award costs to the first respondent without the first respondent justifying that the claim was reasonable, the arbitrator had reversed the burden of proof. This coupled with his failure to afford the applicant and the second respondent an opportunity to make submissions, offends the rules of natural justice and therefore vitiates the award.

[10c] Failure to observe the rules of natural justice is misconduct and therefore fatal to the award. This misconduct could also be perceived to mean that the arbitrator did not give a fair trial to the parties.

[11] The applicant and the second respondent are two separate legal entities and thus the arbitrator ought not to have communicated with one party to the proceedings only. The telephone conversation amounts to gross misconduct and thus the arbitrator has misconducted himself and the proceedings. This conduct could be construed to mean that the arbitrator did not give equal consideration to the arguments of the parties.

[12] A reasonable suspicion or real likelihood of bias on the part of the arbitrator has been made out. The appearance of bias has been established by his conduct. The arbitrator has committed the acts of misconduct complained of subsequent to his appointment as the arbitrator. The arbitrator has not only misconducted himself but also the proceedings itself. The acts of misconduct of the arbitrator have made the proceedings radically wrong and vicious.

[13] The allegations of the earlier relationship between the arbitrator and the architect may not, on their own, be sufficient to satisfy the two tests. However, the arbitrator's misconduct committed subsequent to his appointment, seen in the light of his earlier relationship with the architect, irresistibly gives rise to the conclusion that there is a reasonable suspicion or real likelihood of bias by the arbitrator in the proceedings.

[Interim award set aside; leave to revoke authority of arbitrator granted.]

Cases referred to:

AC Ho Sdn Bhd v. Ng Kee Seng [1998] 2 CLJ 645 ***(cit)***

Catalina v. Norma [1938] 61 LI L Rep 360 ***(aff)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 ***(foll)***

Progressive Insurance Sdn Bhd v. Gaya Underwriting Services Sdn Bhd [1998] 1 CLJ 235 ***(foll)***

R v. Sussex Justices, ex p McCarthy [1924] 1 KB 256 ***(aff)***

Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(refd)***

Szilard v. Szazz [1955] SC R-3 ***(aff)***

Turner (East Asia) Pte Ltd v. Builders Federal (Hong Kong) Ltd & Anor (No 2) [1988] 2 CLJ 367 ***(aff)***

Legislation referred to:

Arbitration Act 1952, ss. 19(1), 22, 24(1), (2), 25(1)

Other sources referred to:

Administrative Law of Malaysia and Singapore, MP Jain, 1989, 2nd edn, p 209

Russell on the Law of Arbitration, 1970, 8th edn, pp 192, 196

The Law and Practice of Commercial Arbitration in England, Sir Michael Mustill, 1982, p 354

For the applicant - Chia Loong Thye; M/s Lee Hishamuddin
For the 1st respondent - Felix Dorairaj; M/s Dorairaj, Low & Teh
For the 2nd respondent - Wong Sow Wei; M/s N Navaratnam & Co

Reported by S Dharmendran

JUDGMENT

Nik Hashim J:

The Application

This is an application by way of an originating motion to set aside the interim award of the learned arbitrator Encik Ng Chee Keong dated 8 January 1998 dismissing the applicant's application for the disqualification and removal of the arbitrator and the incidental award relating to such dismissal on the ground of misconduct under s. 24 of the Arbitration Act 1952 (the Act) and for leave to revoke the authority of the arbitrator to act as the arbitrator on the ground of reasonable suspicion of bias on his part pursuant to s. 25 of the Act. All references in this judgment to provisions of law shall be to sections of the Act.

The Facts

The Kumpulan Perunding (1988) Sdn. Bhd. (the 1st respondent) was appointed to provide architectural services in respect of a development called Ibai Golf and Country Resort Development, Mukim Kuala Ibai and Mukim Bukit Besar, Terengganu (the project). The architect who was principally involved in the project is Dato' Maurice Wee Beng Teck (the architect), who is the principal partner in the 1st respondent company.

The project was initially owned by Ibai Bina Sdn. Bhd. (the 2nd respondent) and was subsequently taken over by Kuala Ibai Development Sdn. Bhd. (the applicant). The 1st respondent is aware of this change of ownership.

A dispute arose in respect of the architectural services provided by the 1st respondent to the applicant and both parties agreed to mutually terminate the services of the 1st respondent and to refer their dispute to arbitration. The 1st respondent is contending that it has been and still appointed by the 2nd respondent, the original owner of the project. At the request of the 1st respondent the Lembaga Arkitek Malaysia (the LAM), who is the appointing authority for the arbitration, added the 2nd respondent as the co-respondent in the said arbitration. Hence the presence of the 2nd respondent. In response to the notice of arbitration, the LAM appointed Encik Ng Chee Keong as the arbitrator to arbitrate on the dispute between the applicant and the 1st respondent.

The applicant took objection to the appointment of the arbitrator as the arbitrator on the grounds of a reasonable suspicion of bias and has requested the arbitrator to disqualify himself as the arbitrator in the arbitration. A series of letters and

correspondence were exchanged between the applicant, the arbitrator and the 1st respondent in respect of this issue.

The Findings Of The Arbitrator On The Application For Disqualification

The applicant's and the 2nd respondent's application before the arbitrator for the disqualification and removal of the arbitrator on the ground of bias or likelihood of bias, was rejected by the arbitrator for the following reasons:

(i) the grounds as cited in the applicant's submission, do not go towards establishing a case of bias or a likelihood of bias;

(ii) there is no bias or likelihood of bias on the arbitrator's part and there is no element of personal involvement by the arbitrator with the subject matter of the dispute at hand nor with any of the parties in the sense as highlighted in the facts of the several cases referred to in the submissions and replies of counsel;

(iii) the facts of those cases referred to are totally different and distinguishable from the facts of the matter here, the authorities referred to are therefore not relevant nor applicable to the facts of this matter in this arbitration;

(iv) there is no linkage between the arbitrator and the subject matter nor with the parties as is seen in the cases referred to.

(p. 3 and 4 of the Interim Award)

As a result of the rejection of the application for disqualification, the arbitrator made the following award at p. 5 of the Interim Award:

2(i) That the 1st (2nd Respondent) and 2nd Respondents (Applicant) shall pay the Claimant's (1st Respondent's) costs in so far as it relates to the Respondents' (2nd Respondent's and Applicant's) application for disqualification and removal of the Arbitrator on grounds of bias or likelihood of bias, in the proportions as follows:

– 1st Respondent (2nd Respondent) to pay 25%;

– 2nd Respondent (Applicant) to pay 75%.

(ii) The Claimant's (1st Respondent's) costs shall be inclusive of 5% service tax if applicable and shall be paid within four (4) weeks of receipt of claimant's (1st Respondent's) statement of costs.

3(i) The costs of this award, in so as it relates to the Respondents' (2nd Respondent's and the Applicant's) application for disqualification and removal is taxed and settled at Ringgit Malaysia: Twelve thousand and seventy-five only (RM12,075.00);

(ii) The said costs of RM12,075.00 shall be paid by the 1st and 2nd Respondents (2nd Respondent and Applicant respectively) in proportions as follows:

– 1st Respondent (2nd Respondent) to pay RM3,018.75,

– 2nd Respondent (Applicant) to pay RM9,056.25.

(iii) The 1st and 2nd Respondents (2nd Respondent and Applicant respectively) shall pay the amounts of RM3,018.75 and RM9,056.25 respectively to the Arbitrator within two (2) weeks of date of this award.

Hence the application before me.

The Contentions Of The Applicant

It is the contention of Encik Chia Loong Thye, learned counsel for the applicant that the arbitrator has committed several acts of misconduct, namely:

(a) Prejudging the issue;

(b) Taking into consideration matters which he ought not to consider;

(c) Delegation of power and duty;

(d) Refusing to grant a proper hearing as to the question of costs;

(e) Reversing the burden of proof in deciding the quantum of costs payable to the 1st respondent;

(f) Communicating with the counsel for the 2nd respondent by phone without the knowledge of the lawyers of the other party.

Thus, such conduct of the arbitrator warrants his removal and setting aside the Interim Award under s. 24 of the Act. As for the application to revoke the authority of the arbitrator under s. 25, the applicant is saying that the arbitrator may not be impartial on the grounds that:

(a) The Claimant (the 1st Respondent) in the arbitration proceeding is Kumpulan Perunding (1988) Sdn. Bhd. However, the architect involved in the project is Dato' Maurice Wee Beng Teck (the Architect). The Architect studied architecture in the University of Newcastle, New South Wales, Australia from 1965 to 1969 and graduating in 1970 with Bachelor of Architecture;

(b) The Arbitrator also studied architecture in the same university as the Architect from 1966 to 1970 and graduating in 1971 with Bachelor of Architecture;

(c) The Arbitrator had various periods in 1966, 1967 and 1968 been a lodger at the Newcastle YMCA Hostel. The Architect was also a lodger at the Hostel at various periods during that period of time;

(d) The Architect and the Arbitrator have common friends although by and large, they had their own circle of friends;

(e) Both the Architect and the Arbitrator are members of the Royal Australian Institute of Architecture and Malaysian Institute of Interior Designers;

And counsel for the applicant urged the court to hold on the 'reasonable suspicion' test that the arbitrator, based on his conduct subsequent to his appointment, may not be impartial in the arbitration proceedings, and therefore prays that the authority of the arbitrator be revoked.

The Contentions Of The 1st Respondent

Encik Felix Dorairaj, learned counsel for the 1st respondent argued that the allegations contained in para. 10(a) to (e) above are sufficiently remote, and therefore cannot satisfy s. 25 and the 'reasonable man' and the 'real likelihood' test. With regard to the alleged misconduct by the arbitrator in para. 9(a) to (f) above, counsel submitted that the arbitrator is not guilty of misconduct and urged the court to adopt a benevolent attitude to the interpretation of arbitral awards and particularly to those made by commercial men and the court must not be overready to set aside awards where parties have agreed to abide by the decision of a tribunal of their own selection, unless there has been something radically wrong and vicious in the proceedings and cited *AC Ho Sdn. Bhd. v. Ng Kee Seng* [1998] 2 CLJ 645; [1998] 2 MLJ 393 in support.

The Contentions Of The 2nd Respondent

Encik Wong Sow Wei, learned counsel for the 2nd respondent however, supported the application by adopting the submission of the applicant. According to him, the 2nd respondent has been aggrieved by the arbitrator's award and asked the court to allow the application with costs to be borne by the 1st respondent.

The Law, s. 24 and 25 Of The Act

The power of removal of arbitrator and setting aside of arbitrator's award is provided under s. 24:

> (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him;
>
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

The above provisions are self-explanatory.

The power of the High Court to give relief for leave to revoke the authority of the arbitrator where an arbitrator is not impartial is provided under s. 25 which states:

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and, after a dispute has arisen, any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave

> to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.

From the reading of the section, I find that the meaning of the word "impartial" in s. 25(1) is not restricted to the "relationship" of the arbitrator to any other parties to the agreement or "connection" of the arbitrator to the subject referred. To my mind, if an arbitrator is not impartial he should be disqualified and it does not matter whether his lack of impartiality arose out of his relationship or connection with one of the parties or the subject referred. An arbitrator can be or perceived to be impartial arising out of his conduct (as in *Turner (East Asia) Pte Ltd. v. Builders Federal (Hong Kong) Ltd. & Anor. (No. 2)* [1988] 2 CLJ 367; [1988] 2 MLJ 502) or arising out of his racial prejudice (as in *Catalina v. Norma* [1938] 61 LI L Rep. 360).

Raja Azlan Shah J (as His Highness then was) in *Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210 explained the word "misconduct" at p. 211 at para. F (right):

> ... In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principle of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

On the issue of bias against a judge, Yang Arif NH Chan JCA in *Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin & Ors.* [1995] 2 MLJ 213, at p. 223 observed:

> Other than an interest which is pecuniary or proprietary in the subject matter of the proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity.

At p. 226 the learned judge said:

> There must be circumstances which would lead a reasonable and fair-minded person sitting in court to have reasonable ground to suspect that the judge would appear to be biased ... The proper test on the appearance of bias is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible.

He then continued at p. 228 and stated:

> To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given **reasonable ground** for him to suspect that the case would not be decided according to the evidence. (Emphasis added).

It would appear from the above passages that the learned Judge of the Court of Appeal is inclined more towards the "reasonable suspicion" test rather than the "real likelihood" test. Although *Hock Hua Bank, supra,* has reference to a judge, the position of law enunciated by the Court of Appeal, in my view, is also applicable to an arbitrator.

However, in *Progressive Insurance Sdn. Bhd. v. Gaya Underwriting Services Sdn. Bhd.* [1998] 1 CLJ 235; [1997] 3 MLJ 524, where it was alleged that the arbitrator had a personal interest in the subject matter of the suit which disqualified him from acting, the Court of Appeal (comprising NH Chan, Mahadev Shanker and Ahmad Fairuz, JJCA) held that:

> ... a real **likelihood of bias** must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. (Emphasis added).

The Findings Of The Court

For my part, I accept both the tests as being the law at present, though the trend is towards the application of the "reasonable suspicion" test, as in essence, the "reasonable suspicion" test seems to be somewhat broader than the "real likelihood" test. (See Prof. M.P. Jain in his book, *Administrative Law of Malaysia and Singapore,* 2nd Edn. 1989 p. 207).

Therefore, applying the above principles to the facts of the present case, I am satisfied that a reasonable suspicion or real likelihood of bias on the part of the arbitrator has been made out. The appearance of bias has been established by his conduct. The arbitrator has committed the acts of misconduct complained of subsequent to his appointment as the arbitrator, and such misconducts, to my mind, are sufficient to remove him as the arbitrator. The allegations of the 'earlier relationship' between the arbitrator and the architect as listed under para. 10(a) to (f) above may not on their own be sufficient to satisfy the two tests, but the arbitrator's misconduct committed subsequent to his appointment as the arbitrator, seen in the light of his earlier relationship with the architect, irresistibly gives rise to the conclusion that there is a reasonable suspicion or real likelihood of bias by the arbitrator in the proceedings. That conclusion is based on the following acts of misconduct by the arbitrator.

(a) Prejudging The Issue

At the first preliminary meeting of the arbitration on 17 November 1997 the arbitrator made an opening remark. In response to the request by the applicant for an adjournment of the arbitration to study the facts stated by the arbitrator in his letter of 14 November 1997 and to make submission on whether the arbitrator should disqualify himself as the arbitrator, he *inter alia,* said (which is not disputed) to the effect that with the facts that he has revealed as to the relationship between himself and the architect, there is no ground for him to disqualify himself or to withdraw himself as the arbitrator, and that as the President of the Malaysian Institute of Arbitrators, he has to set good examples to the members and should not be showing bias, and, if he should decide to withdraw now on the grounds advanced by the applicant it would look badly on him since he has already accepted the appointment as the arbitrator. In my view, the remarks tend to give the impression that the arbitrator has prejudged the applicant's application without waiting for the further submission of the applicant, notwithstanding that the arbitrator has said that he will keep an open mind. It does not matter whether the remarks of the arbitrator were made before or after the submission. What is important is that an arbitrator should keep an open mind and not to prejudge the issue before hearing fully the arguments of the parties. Prejudging the issue is a misconduct. The arbitrator has therefore misconducted himself. In *Turner, supra,* at p. 515 (F-G), the arbitrator prematurely gave his views on the Legal Profession Act issue though he did qualify himself by saying that "I have in no way closed my mind on this subject." The learned Judicial Commissioner in that case held that it could be construed that the arbitrator was not to give equal consideration to the arguments of the parties. The arbitrator was removed.

(b) Taking Into Consideration Matters Which He Ought Not To Take

The opening remarks made by the arbitrator is an irrelevant consideration. It gave the impression that the arbitrator is taking into consideration factors which he ought not to have taken into consideration. The arbitrator is more concerned with his image rather than having to attend to the issue at hand, ie, whether there are any merits in the applicant's application. Thus, by taking into consideration his personal image, the arbitrator has misconducted himself.

(c) Delegation Of Power And Duty

In the course of the arbitration proceedings the arbitrator obtained an independent legal opinion in respect of the application to disqualify the arbitrator. In exh. YSS-15, the arbitrator states:

> I have considered at great length the submission of the 2nd Respondent (Applicant), the Claimant's (1st Respondent's) reply to the submission and the Respondent's (Applicant's) reply to the Claimant's (1st Respondent's) reply, I have also obtained an independent legal opinion on this matter of bias or likelihood of bias, and it is

clear to me that the grounds as cited by the 2nd Respondent (Applicant), item (a) to (e) of the 2nd Respondent's (Applicant's) submissions, does not go towards establishing a case of bias or a likelihood of bias, the independent legal opinion obtained has fortified my view.

It is to be noted that this legal opinion was obtained without the knowledge and consent of the applicant. Further, the arbitrator has incurred costs in seeking the opinion of the independent legal counsel and the arbitrator has directed in his Interim Award that the applicant and the 2nd respondent shall be liable for this cost. I hold this is unfair to both the applicant and the 2nd respondent. In the absence of prior consent of the parties, the arbitrator has no authority to engage the independent legal counsel and direct the applicant and the 2nd respondent to bear the cost. The unfair and unauthorised conduct of the arbitrator makes the proceedings irregular. This irregularity of action by the arbitrator is not consonant with the general principle of equity and good conscience (see *Syarikat Pemborong, supra*).

An arbitrator who is appointed to decide upon disputes involving questions of law must make his own decision. He cannot transfer it to another, and adopt as his own a decision of some legal adviser. If he cannot proceed without instruction as to the law, he should state a case to the court or (if the parties prefer it, as they do sometimes) for the opinion of counsel (see Russell on the *Law of Arbitration*, 8th Edn. 1970 pp. 192, 196).

In the present case, the arbitrator referred the very issue which forms the subject matter of the applicant's application before him to the independent legal counsel for the opinion. Certainly, this amounts to a delegation of the arbitrator's power and duty, and therefore, a misconduct of the proceedings. If the arbitrator is not confident in his ability to decide the issue of the applicant's application, he could have resorted to the provision of s. 22 in the form of a special case for the decision of the High Court. This he never did.

(d) Refusing To Grant A Proper Hearing As To The Question Of Costs And Reversing The Burden Of Proof In Deciding The Quantum Of Costs Payable To The 1st Respondent

After the Interim Award was made the applicant and the 2nd respondent took objection to the manner in which the arbitrator has dealt with the question of costs payable to the 1st respondent as a result of the arbitrator dismissing the applicant's application before the arbitration. Briefly, the applicant's complaints are that:

(i) The arbitrator's exercise of his discretion in directing that the costs of the 1st respondent be paid forthwith, and

(ii) The arbitrator in arriving at the decision to award costs of RM23,650 to the 1st respondent, reversed the burden of proof.

On the issue of costs, though s. 19(1) gives the arbitrator the discretion "to direct and by whom and in what manner those costs or any part thereof shall be paid ..." nevertheless, the discretion must be exercised judiciously, in accordance with the law and with the principles of natural justice. In this case, he failed to observe them. The arbitrator directed the costs of the 1st respondent to be paid forthwith without a request by the 1st respondent and without affording the applicant and the 2nd respondent an opportunity to respond to the views and comments of the 1st respondent's letter dated 8 April 1998. Moreover, there is no exceptional circumstances shown to the arbitrator to warrant the costs to be paid forthwith (see *The Law and Practice of Commercial Arbitration in England* by Sir Michael Mustill 1982 p. 354). In arriving at the decision to award the costs of RM23,650 to the 1st respondent, without the 1st respondent justifying them that its claim was reasonable, the arbitrator has reversed the burden of proof, and his failure to afford the applicant and the 2nd respondent an opportunity to make submissions and thus offending the rules of natural justice, has vitiated the award. Failure to observe the rules of natural justice is misconduct and therefore, fatal to the award. This misconduct could also be perceived that the arbitrator was not to give a fair trial to the parties.

(e) Communicating With The Counsel for The 2nd Respondent By Phone Without The Knowledge Of The Other Counsel

This incident happened on 3 April 1998 when the arbitrator telephoned the counsel for the 2nd respondent and requested the counsel to state the ground of his objections more clearly to the question of costs. This telephone call was made after the arbitrator has already issued a written directive dated 27 March 1998 to all parties to submit to him by 6 April 1998. (exh. YSS-1-H - encl. 7). With regard to the telephone call, it is highly injudicious and indeed improper for the arbitrator to communicate with the 2nd respondent's counsel without the knowledge and consent of the counsel for the other parties. It is irrelevant whether the 1st respondent objected to such communication or not. The applicant and the 2nd respondent are two separate legal entities and are named separately in the arbitration proceedings. Therefore, the arbitrator ought not to have communicated with one party to the proceedings only. Viewed in the light of the other misconducts, I, with great respect to the learned arbitrator, hold that this telephone conversation, even though "one-off", is gross misconduct. Thus, the arbitrator has misconducted himself and the proceedings. The conduct could be construed that the learned arbitrator was not to give equal consideration to the arguments of the parties.

The Conclusion

It is worthy of note that parties to the arbitration are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide. They are also entitled to expect from him a faithful, honest and disinterested decision. Lack of impartiality or bias will be a ground on which objection may be taken against an arbitrator (see *Szilard v. Szazz* [1955] SC R-3). The arbitrator must not only be free from bias, but there must not be even an appearance of bias.

There can be no doubt that an arbitrator must always act judicially with a detached mind and with patience. He must not at any time descend into the arena or take an adversarial role. His response and words used must always be measured and circumspect (per Chao Hick Tin JC in *Turner, supra,* at p. 514, E). He must rule only after hearing the parties. He should always maintain the dignity and impartiality of the appointment. This the learned arbitrator in this case has failed to do.

An arbitrator, once appointed, must take note that his duty is to dispense justice according to law to the best of his ability, and he must always be conscious of Lord Hewart's reminder in *P v. Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at p. 259 that "justice should not only be done but should manifestly and undoubtedly be seen to be done."

In the present case, it has been amply established that the arbitrator has not only misconducted himself but also the proceeding itself. He has shown bias in the proceedings. The misconducts committed by the arbitrator have made the proceedings radically wrong and vicious. (See *AC Ho Sdn. Bhd., supra*).

In the event, and with much regret, I have to order the Interim Award of the learned arbitrator dated 8 January 1998 be set aside and grant leave to revoke the authority of Encik Ng Chee Keong as the arbitrator as per terms prayed in the notis usul pemula under reliefs (a) and (b) respectively. I also order that the costs of this application and the Interim Award of 8 January 1998 of the arbitrator be taxed and borne by the 1st respondent. I order that no costs be awarded against the 2nd respondent.